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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 652

GEORGE SOLLITT CONSTRUCTION COMPANY, a corporation,

Petitioner,

vs.

GATEWAY ERECTORS, INCORPORATED, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Justices of the Supreme Court of the United States:

Petitioner, George Sollitt Construction Company, a corporation, Plaintiff-Appellee in the proceedings below, petitions this Court for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review the judgment of that Court entered on October 22, 1958, reversing a judgment of the United States District Court for the Northern District of Illinois, Eastern Division, in a cause tried by the court, without a jury, upon a stipulation of facts, in the sum of One Hundred Twelve Thousand,

Two Hundred Thirty Nine and 08/100 Dollars ($112,239.08) together with costs, in favor of Petitioner and against Respondent, which said judgment was theretofore entered on the 17th day of February 1958 (App. 70-71).

OPINION OF THE COURT BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit is reported in 260 F. 2d 165, under the caption "*George Sollitt Construction Company, a corporation, Plaintiff-Appellee* v. *Gateway Erectors, Incorporated, a corporation, Defendant-Appellant, and The Fidelity and Casualty Company of New York, a corporation, Defendant*" and is also set forth in the appendix to this Petition. (App. this petition p. 1.)

The United States District Court for the Northern District of Illinois, Eastern Division, rendered a memorandum opinion and order which was not published, and is also set forth in the appendix to this Petition. (App. this petition p. 12.)

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The judgment of the United States Court of Appeals sought to be reviewed was entered October 22, 1958 (Certified Appendix, Insert attached to back cover). A Petition for Rehearing was denied by said Court of Appeals on November 18, 1958. (Certified Appendix.)

This Court has jurisdiction to review the judgment in question upon Writ of Certiorari under 28 U.S.C. §1254(1). This petition is filed within ninety days after the denial of said petition for rehearing by said Court of Appeals and said judgment as required by 28 U.S.C. §2101(c).

THE QUESTON PRESENTED FOR REVIEW.

The question presented for review is whether the United States Court of Appeals decided an important question of Illinois law relating to exculpatory indemnity provisions in construction contracts, contrary to the applicable Illinois decisions and in violation of this Court's pronouncement in *Erie R.R.* v. *Tompkins*, 304 U.S. 64, and the terms of 28 U.S. Code §1652, in applying a rule of construction patently derived from the case law of Pennsylvania to defeat recovery of indemnity by a general contractor from his sub-contractor, whose employee was injured in the fall of a hoist.

STATUTE INVOLVED.

Title 28 U.S.C. §1652:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

STATEMENT OF THE CASE.

Petitioner was a general contractor under an agreement dated June 12, 1950 with the University of Chicago and the United States Government, as owners, for the construction of the Argonne Cancer Research Hospital on the campus of the University of Chicago (App. 4, 5, 41). Respondent was a sub-contractor who undertook to furnish and erect the reinforcing steel mesh, shelf angle inserts and bolts and shelf angles on said construction (App. 4, 42). One Phillip Shoevlin, an employee of Respondent, while engaged in the performance of the work covered by Respondent's contracts with Petitioner (App. 48), was seriously injured when a hoist which he was using at the building site, fell because of a defective dog or switch (App. 9, 42). Petitioner was chargeable with the negligence or breach of duty which occasioned this injury (App. 9, 42).

Respondent's employee, Phillip Shoevlin, recovered a judgment against Petitioner for $140,000.00 in the Superior Court of Cook County Illinois (App. 11, 43). This judgment was subsequently settled for the sum of $90,000.00 (App. 49). It was stipulated that no question was raised as to the propriety of the settlement nor as to the timely service of the divers notices upon Respondent and its insurance carrier, initially to take over the defense of the Shoevlin suit, and subsequently to indemnify Petitioner for the amount of the settlement and expenses (App. 48, 49, 54-63 incl.). It was also admitted that Respondent refused to defend the Shoevlin suit and refused to pay the indemnity demanded on the ground that the indemnity features of the agreement between Petitioner and Respondent did not contemplate protection to Petitioner under the circumstances (App. 56).

The proceedings in the United States District Court and that Court's jurisdiction.

The instant proceedings were commenced in the United States District Court for the Northern District of Illinois, Eastern Division, for a declaration of the rights of the parties with respect to indemnity for the Shoevlin injury (App. 3). In addition to respondent, its insurance carrier The Fidelity and Casualty Company of New York was a defendant to the declaratory judgment proceedings (App. 3). Petitioner is a citizen of Illinois. Respondent is a Delaware corporation, and defendant The Fidelity and Casualty Company of New York is a New York corporation. The amount was in excess of $3000.00. Jurisdiction of the United States District Court was admitted (App. 48).

After judgment was entered in favor of Shoevlin in the State court proceedings, and that judgment was settled (App. 49), an amended supplementary complaint setting forth an action for indemnity was filed in the United States District Court (App. 1). The cause was submitted to the court without a jury, upon the admissions contained in the pleadings and a stipulation of facts. That court entered a judgment in favor of petitioner for $112,239.08, being the amount of the settlement together with expenses and interest (App. 70, 49, 68). At the same time, the amended complaint was dismissed without prejudice as to defendant The Fidelity and Casualty Company of New York, on the ground that, as to it, the action was premature (App. 71).

No question was raised in the Court of Appeals as to the amount of the judgment, the sole question presented being whether, under the agreements between the parties (there were two of them, identical in all material respects) petitioner was entitled to indemnity for the damage and injury occasioned to respondent's employee due to negligence for which petitioner was responsible.

Contract Provisions.

The following are the material provisions of the contracts between the parties:

First: That respondent agreed to assume all responsibility for furnishing and completing all of the erection of reinforcing steel, reinforcing steel mesh (Exhibit A, App. 15) and shelf angle inserts with shelf angle bolts and the erection of shelf angles (Exhibit B, App. 24-25) under petitioner's general contract with the University of Chicago (App. 15, 25).

Second: That the conditions of the contract between petitioner and the University of Chicago are made a part of this agreement (App. 16, 25).

Third: The undertaking by respondent to save petitioner harmless, as follows (App. 17, 26):

> "Article 3. That he will save the party of the first part, the Owner, and the Architect free and harmless against any expense, loss, cost or damage arising from or on account of:
>
> 1. Injuries to party of the second part and his employees.
>
> 2. Injuries to the public.
>
> 3. Damage to property caused by party of the second part, his employees, agents and subcontractors.
>
> 4. Any negligence or carelessness of party of second part, his agents, employees and subcontractors.
>
> "That before entering upon the performance of this contract, the party of the second part will procure, at his own expense, insurance covering the abovementioned liabilities from insurance companies, and in amounts and limits satisfactory to party of the first part, and that said insurance will be kept in full force and effect at all times while this contract shall remain

in force and not fully performed on his part, such insurance coverage to be evidenced by certificates of insurance delivered to party of the first part.

"That if the party of the first part so elects, party of the second part will furnish a satisfactory indemnity accident policy protecting party of the first part and the Owner in case of accident to party of the second part, his agents, employees, subcontractors, or the public, and that if any suits are entered against party of the first part or the Owner on account of acts or omissions by party of the second part, his agents, employees or subcontractors, the party of the second part will defend such suits and reimburse either or both the party of the first part or the Owner for any expense, costs, loss or damage they may be put to, including court costs and attorneys' fees.

"That he will pay to party of the first part, in proportion that the amount of this subcontract bears to the general contract his prorata share of the cost of Builders' Risk, Fire & Extended Coverage Insurance, and Contractor's Contingency Insurance, that the party of the first part elects or is required to place on account of the general contract."

The compulsory insurance rider procured by Respondent.

Article XII of the agreement between petitioner and the University of Chicago contained a detailed hold harmless or indemnity contract, among other things including within its subject matter, injury or damage consequent upon the failure or use or misuse of any hoist (Exhibit G, App. 67). Language identical to that contained in the principal contract was set forth in the insurance rider which respondent procured pursuant to the obligation imposed upon respondent by the second full paragraph of Article 3 of its contract with petitioner, with the following changes only:

The word "subcontractor" (referring to respondent) was substituted for "contractor" (referring to petitioner) wherever the word "contractor" appeared in Article XII;

and the word "contractor" was added to "to the University or the Government" in the description of the indemnitees as that description appeared in said Article XII (App. 35, Exhibit C).

The Rider provides:

"The Fidelity and Casualty Company of New York.
Contractual Agreement, Dated 6-22-50.

"B—Liability for Damage to Persons and Property.

"1. The Sub-Contractor assumes entire responsibility and liability for losses, expenses, damages, demands and claims in connection with or arising out of any injury or alleged injury (including death), or damage or alleged damage to property, sustained or alleged to have been sustained in connection with or to have arisen out of the performance of the work by the Sub-Contractor, its Sub-Contractors and their agents, servants, and employees, including losses, expenses, or damages sustained by the Contractor, the University or the Government, and shall indemnify and hold harmless the Contractor, the University (and the Board of Trustees of said University, individually and collectively), and the government, the agents, servants and employees of the foregoing from any and all such losses, expenses, damages, demands and claims, and shall defend any suit or action brought against them or any of them, based on any such alleged injury or any of them, based on any such alleged injury or damage, and shall pay all damages, costs, and expenses, including attorney's fees, in connection therewith or resulting therefrom.

"2. 'Injury' or 'damage', as those words are used in Section 1 of this Article, shall be construed to include, but not be limited to, injury or damage consequent upon the failure or use or misuse by sub-contractor, its agents, servants, and employees, of any hoist, rigging, blocking, scaffolding or any and all other kinds of equipment, whether or not owned, furnished by the Contractor, the University or the Government. * * * "

ARGUMENT.

I.

THE UNITED STATES COURT OF APPEALS, WHILE PROFESSING TO DECIDE THIS CASE ON THE BASIS OF ILLINOIS LAW, AS WAS REQUIRED BY THIS COURT'S DECISION IN ERIE R.R. v. TOMPKINS, 304 U. S. 64, ACTUALLY DENIED PETITIONER INDEMNITY BY APPLYING A SUPERSTRICT RULE OF CONSTRUCTION DERIVED FROM THE CASE LAW OF THE STATE OF PENNSYLVANIA.

There was and is no disputed question of fact in this case. Respondent's employee Shoevlin was admittedly injured by the fall of a defective hoist which he was using in the course of and in the performance of the work on the Argonne National Hospital, which respondent had undertaken by its subcontracts with petitioner. Each of these subcontracts, in Article 3 thereof, specifically provided (App. 17, 26):

> "Party of The Second Part Agrees as Follows:
>
> * * *
>
> "Article 3. That he will save the party of the first part (Petitioner), * * * free and harmless against any expense, loss, cost or damage arising from or on account of:
>
> 1. Injuries to party of the second part (Respondent) and his employees."

The trial court in its memorandum, upon the basis of which judgment was entered in favor of petitioner, held (App. 69):

> "It is undisputed that one may contract to indemnify against his own negligence. Such obligation of course must be expressed in clear, explicit and unequivocal terms. It is the considered conclusion of this Court

that the terms of the agreement between plaintiff and Gateway are clear, explicit and unequivocal and do dictate entry of judgment in this action for plaintiff and against defendant Gateway * * *". (App. this Petition, p. 12).

In reversing the judgment, the United States Court of Appeals stated, quoting from the Pennsylvania case of *Perry* v. *Payne*, 217 Pa. 252, with reference to indemnity against the consequences of one's own negligence (App. this Petition, p. 8):

> "Liability on such an indemnity is so hazardous, and the character of the indemnity so unusual and extraordinary, that there can be no presumption that the indemnitor intended to assume the responsibility unless the contract puts it *beyond doubt by specific stipulation.*" (Italics by the Court of Appeals.)

The Court of Appeals then proceeded to hold that petitioner was not entitled to indemnity in this case because the contract failed to set forth specific language referring to injuries caused by petitioner's own negligence, or negligence with which it was chargeable. Thus the Court of Appeals said (App. this Petition, p. 9):

> "The Illinois law required that an express reference to the negligence of plaintiff should have been incorporated. Such language is not in Paragraph A* and Illinois law does not permit us to engraft it thereon".

This determination by the Court of Appeals is absolutely contrary to the decisions of the Illinois courts which have had occasion to pass upon the question. It has resulted in creating utter confusion with respect to the rights of general contractors on construction projects in connection with which, because of the dangers inherent in the use of

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*The Court in its opinion denominated the first full paragraph of Article 3 as paragraph (A).

scaffolds and hoists, indemnity agreements, such as those at bar, are almost universally required of subcontractors.

Illinois law does not require the use of language specifically referring to an indemnitee's own negligence in exculpatory provisions:

In *Russell* v. *Shell Oil Co.*, 339 Ill. App. 168, the Illinois Appellate Court for the First District gave effect to such an agreement which made no reference whatsoever to Shell Oil Company's negligence. Moreover, except for immatrial differences, that agreement was identical to the agreements at bar, as was the factual situation. In the *Russell* case, a painter employed by the contractor was injured when a post owned by Shell Oil, against which his ladder had been placed, gave way. The indemnity agreement in the *Russell* case was as follows (*Russell* v. *Shell Oil Co.*, 339 Ill. App. 168 at p. 170):

> "* * * 5. CONTRACTOR shall hold SHELL harmless from any and all claims for injury (including death), to persons (including CONTRACTOR'S agents and employees), or damage to property (including CONTRACTOR'S property), resulting from or arising in connection with any of CONTRACTOR'S operations * * *". (Capitals by the Court.)

The similarity between the language "from any and all claims for injury to persons (including *Contractor's* agents and employees)" and the language at bar, "injuries to party of the second part and his employees" is unmistakable. In the *Russell* case, the Illinois Appellate Court held that the contractor was not entitled to recover, over against Shell, for compensation payments which had been made to his injured employee.

Again, in *Northern States Company, Inc.* v. *A. Finkl & Sons Co.*, 8 Ill. App. 2d 419 (Jan. 11, 1956), the Illinois Appellate Court for the First District gave effect to an indemnity agreement which contained no express language

referring to the indemnitees' own negligence. That case was a declaratory judgment proceeding instituted by plaintiff, a contractor occupying the same position as respondent here, against defendant who occupied the same position as petitioner here, seeking a declaration that an indemnity agreement given by it did not cover an accident in which one of its employees was injured by a crane operated by one of defendant's employees. The active language of the indemnity agreement there involved was as follows (*Northern States Company, Inc.* v. *A. Finkl & Sons Co.*, 8 Ill. App. 2d 419 at 420):

> "It is expressly understood and agreed that the Contractor shall be responsible for any and all injury due to damage to any person and or property, including loss of human life arising directly or indirectly from or in connection with work performed or to be performed under this contract, including extra work, and shall hold the owner harmless of any and all loss or damage from such injury, damage or death."

With respect to this language, the Illinois Appellate Court expressly approved of its prior opinion in *Russell* v. *Shell Oil Co.*, 339 Ill. App. 168, and said, with respect to the construction of the language involved (p. 423):

> "It does not exclude a case of injury to 'any person' due to the negligence of Finkl".

Leave to appeal to the Supreme Court of Illinois was sought and denied in the *Northern States* case, 10 Ill. App. 2d vii.

Both of these Illinois Appellate decisions are controlling at bar, on their facts, and should have been recognized and followed as such by the Court of Appeals, as they were by the District Court.

As This Court said in *West* v. *American Telephone & Telegraph Co.*, 311 U.S. 223 (at pages 236-237) and in

California v. *Henry Taylor, et al.*, 353 U.S. 553 (at page 556, 557, Note), in the absence of a controlling opinion of the Supreme Court of a State the decisions of its intermediate appellate court are to be followed in diversity cases.

It is not the law in Illinois that language referring to the indemnitees' own negligence must appear in the indemnity agreement relied upon. The United States Court of Appeals for the Seventh Circuit in reading this requirement into the law of Illinois and in not applying the decisions of the Illinois Appellate Court on the subject, violated This Court's pronouncement in *Erie R. R.* v. *Tompkins*, 304 U.S. 64.

II.

THE RECENT DECISIONS OF THE SUPREME COURT OF ILLINOIS ON EXCULPATORY PROVISIONS REQUIRED THE AFFIRMANCE OF PETITIONER'S JUDGMENT FOR INDEMNITY IN THE COURT BELOW.

The Supreme Court of Illinois has never had occasion to pass upon an indemnity agreement similar to the one at bar, save so far as it did so in denying leave to appeal in the case of *Northern States Company* v. *A. Finkl & Sons Co.*, 10 Ill. App. vii.

In *Westinghouse Company* v. *LaSalle-Monroe Building Corp.*, 395 Ill. 429, an indemnity agreement was involved which referred only to acts or omissions by the indemnitor himself. The language there involved was the following (p. 432):

> "The Contractor further agrees to indemnify and hold the owner, the owner's employees and agents, the Architects and Engineers, and the City of Chicago, wholly harmless from any damages, claims, demands or suit by any person or persons arising *out of any*

> *acts or omissions by the Contractor his agents, servants or employes* in the course of any work done in connection with any of the matters set out in these specifications, and the contractor shall carry at his own expense insurance in a company satisfactory to the owner to cover the aforesaid liabilities." (Italics ours.)

One of the contractor's employees was killed by the fall of an elevator he was working upon. The owner of the building claimed this occurrence was covered by the indemnity agreement. The Supreme Court of Illinois held (p. 433) that the language of the contract was plain and unambiguous, and that it was clear that "by such language the agreement to indemnify appellant was specifically limited to acts or omissions by appellee, its agents, servants or employes".

The court therefore denied recovery of indemnity. Applying the same rule of construction to the language at bar would require the granting of indemnity, since Subparagraph 1 of Article 3 specifically covers "injuries to (respondent's) employees", unlimited as to cause. In substance, the Court of Appeals here denied indemnity by reading into this clear and specific provision an exclusion "unless occasioned by (petitioner's) negligence".

In the *Westinghouse* case, the Supreme Court of Illinois laid down a rule of construction which, we submit, was correctly applied by the District Court in this case, saying (p. 433):

> "It is quite generally held that an indemnity contract will not be construed as indemnifying one against his own negligence, unless such a construction is required by clear and explicit language of the contract * * * or such intention is expressed in unequivocal terms".

Following this statement, the Supreme Court of Illinois, in the *Westinghouse* case, (p. 434). did discuss the 1907 Pennsylvania decision of *Perry* v. *Payne*, 217 Pa. 252, but did not adopt as its own the super-strict rule of construction these pronounced.

We have already pointed out that in *Russell* v. *Shell Oil Co.*, 339 Ill. App. 168, and *Northern States Co.* v. *A. Finkl & Sons Co.*, 8 Ill. App. 2d 419, leave to appeal denied 10 Ill. App. 2d vii, the Illinois Appellate Court construed exculpatory indemnity provisions to cover claims caused by the indemnitee's own negligence, notwithstanding the complete absence of language expressly referring to the indemnitee's own negligence in the agreements there considered. Recent decisions of the Illinois Supreme Court enforcing and construing exculpatory agreements in leases establish conclusively that the Pennsylvania rule raising a presumption against indemnity for one's own negligent acts and requiring that the contract put such indemnity beyond doubt by express stipulation, is not the law in Illinois:

In *Jackson* v. *First National Bank of Lake Forest*, 415 Ill. 453 (decided September 24, 1953) the Supreme Court of Illinois gave effect to an exculpatory provision in a commercial lease relieving the landlord from liability for his own negligence and laid to rest the theory that there is anything in the public policy of Illinois against such agreements. In *Cerny-Pickas* v. *C. R. Jahn Co.*, 7 Ill. 2d 393 (decided November 23, 1955), the Supreme Court of Illinois approved of its decision in the *Jackson* case and in so doing, construed the lease provisions there involved to relieve the lessee from responsibility for loss of the property by fire occasioned by lessee's own negligence, notwithstanding the fact that words referring to fires occasioned by lessee's negligence did not appear in the agreement.

In the *Cerny-Pickas* case, the Supreme Court of Illinois construed the lease provisions in a manner which would have required affirmance of Petitioner's judgment for indemnity, if applied by the Court of Appeals in the case at bar. The provisions there construed to relieve the lessee for responsibility for loss by fire due to its own negligence were (p. 395): First, a provision that at the end of the term, the lessee would yield up the premises to lessor in good condition and repair (loss by fire and ordinary wear excepted); second, a provision that the lessee would, at his own expense, keep all improvements in good repair, "injury by fire, or other causes beyond lessee's control excepted"; third, a provision that lessor was to pay for fire insurance; and finally, a provision that in the event the premises were rendered untenantable by fire, the lessor had an option to terminate or repair within sixty days, and upon failing so to do, or upon destruction of the premises by fire, the term should cease.

The Supreme Court of Illinois in reversing a judgment which had been entered against lessee for the loss due to fire occasioned by lessee's negligence, first stated (p. 396):

> "But because the contingency was not covered by express language, it does not follow that the instrument may not, when all of its provisions are considered, show that the parties themselves intended that the lessee should not be liable."

The Supreme Court of Illinois then proceeded to hold that the use of the term "fire", without qualification in the lease provisions, should include all fires regardless of their origin. The Court said (p. 397):

> "To express the meaning for which the lessor contends, the lease would have to be altered to modify the word 'fire' by the qualifying words 'not due to lessee's

> negligence.' It is more reasonable to assume, we think, the layman would regard the word 'fire as including all fires whether of negligent origin or otherwise."

As applied to the case at bar, this type of construction, we submit, requires that the language appearing in Article 3 of the agreements be construed without qualification, *i.e.* that the words "not due to Sollitt's negligence" may not be added or construed into Respondent's clear and unequivocal obligation to save Petitioner harmless "from any loss, cost or damage arising from or on account of: (1) Injuries to (Respondent) and his employees."

Finally, in *O'Callaghan* v. *Waller & Beckwith Realty Co.*, 15 Ill. App. 2d 349 (decided November 6, 1957), the Illinois Appellate Court for the First District, upheld exculpatory provisions in a residential lease. In that case, among other things, the Illinois Appellate Court stated (p. 356):

> "It should also be noted that in the field of indemnity contract law, which involves principles similar to those in the case at bar, the trend has been toward extending the principle of freedom of contract, as against the argument that an agreement indemnifying one against the consequences of his own negligence is void as against public policy."

Since the rendition of the opinion at bar, the Supreme Court of Illinois on November 26, 1958, affirmed the Appellate Court judgment in the *O'Callaghan* case. For the convenience of the Court, this opinion of the Supreme Court of Illinois, which has not yet been published, is reproduced in full in the appendix to this Petition (Appendix, this Petition p. 13). The *O'Callaghan* case, of course, did not involve any question of construction. Of significance, however, are the following comments of the Supreme Court of Illinois, which make it clear that exculpatory clauses in leases and in indemnity agreements

are regarded by that Court as falling within the same category. Thus Mr. Justice Schaefer speaking for the Supreme Court said (App. this Petition, p. 15):

> "An anticipatory agreement relieving a party from liability for the consequences of his own negligence, whether in the form of a release, a covenant not to sue or an indemnity agreement, requires no violation of duties imposed by the constitution, statute or common law. A contract shifting the risk of liability for negligence may benefit a tenant as well as a landlord (See *Cerny-Pickas & Co.* v. *C. R. Jahn Co.*, 7 Ill. 2d 393.) Such an agreement transfers the risk of a possible financial burden, and so may minimize the sanctions that induce adherence to the required standard of care. But the legal duty remains unchanged. For this reason contracts for liability insurance as indemnity against one's own negligence are accepted, and even encouraged. *E.g.*, see provisions of Financial Responsibility Act, Ill. Rev. Stat. 1957, chap. 95½, pars. 7— 202(1) and 7— 315."

III.

THE ACTIONS OF THE PARTIES TO THE INSTANT CONTRACTS CONCLUSIVELY DEMONSTRATE THEIR INTENTION THAT THE RISK OF INJURY TO RESPONDENT'S EMPLOYEES WAS TO BE BORNE BY RESPONDENT.

The provisions of Article 3 of the contracts in suit upon which Petitioner relies are clear and unequivocal. They require no construction. Viewing the contract as a whole, it might be claimed that some ambiguity exists with respect to Article 2 of the contracts which adopted the conditions of the basic contract between Petitioner and the University of Chicago as a part of the sub-contracts (App. 16, 25). As we have pointed out in our statement, this basic contract, among other things, contained a specific provision requiring that the Government and the University be

saved harmless against any and all injuries "consequent upon the failure, use or misuse * * * of * * * any hoist" regardless of by whom owned. In the court below, Respondent conceded that had this provision appeared in the sub-contracts, Petitioner would have been entitled to indemnity for the loss, cost and expense due to the injury to Shoevlin, Respondent's employee. (Appellant's Brief pp. 24, 25, certified Br. & App.)*

What effect then should be given to the actions of the parties in this case? The second full paragraph of Article 3 of the sub-contracts in this case required Respondent to "procure insurance at his own expense, covering the above mentioned liabilities", which liabilities included the obligation imposed by Article 3, sub-section 1, with respect to "injuries to party of the second part and his employees."

The insurance rider actually procured pursuant to this requirement has been set forth in our statement and as was pointed out, is in the identical phraseology as that contained in the indemnity provisions of the original contract between Petitioner and the University of Chicago, with the addition of the word "Contractor" (referring to Petitioner) as an indemnitee, and with the substitution of the word "sub-contractor" (referring to Respondent) as the indemnitor, wherever it appears.

It is the law in Illinois that "there is no more convincing evidence of what the parties intended" by a contract "than to see what they did in carrying out its provisions." (*Department of Revenue* v. *Jennison-Wright Corp.*, 393 Ill. 401, 408; *Cedar Park Cemetery Association* v. *Village of Calumet Park*, 398 Ill. 324, 335; *Walter* v. *Sohio Petroleum Co.*, 402 Ill. 33, 41).

* Respondent filed its Brief and Appendix under a single cover in the Court of Appeals. A new series of page numbers appears for the Appendix in that volume.

In view of the actions of Respondent here in procuring insurance specifically covering the very risk which occasioned the injury to Respondent's employee, Shoevlin, we respectfully submit it is apparent that the decision of the United States Court of Appeals for the Seventh Circuit, here sought to be reviewed, obviously thwarted the intention of the parties on the subject matter of indemnity.

CONCLUSION.

For the reasons hereinabove set forth, Petitioner respectfully prays that this Honorable Court issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, to review the judgment of that Court entered October 22, 1958, and that upon said review, said judgment be reversed with directions to affirm the judgment in favor of Petitioner and against Respondent theretofore entered on February 17, 1958, by the United States District Court for the Northern District of Illinois, Eastern Division.

ROBERT B. JOHNSTONE
Attorney for George Sollitt Construction Company, a corporation, Petitioner

L. H. VOGEL
CHARLES J. O'LAUGHLIN
Of Counsel

APPENDIX

The Opinion of the United States Court of Appeals for the Seventh Circuit 1

Memorandum Opinion of the United States District Court for the Northern District of Illinois, Eastern Division 12

Opinion of the Supreme Court of Illinois, dated November 26, 1958, in Cause No. 34723, entitled: "Virginia O'Callaghan, Administrator, Appellant v. Waller & Beckwith Realty Company, Appellee" 13

In the

United States Court of Appeals

For the Seventh Circuit

No. 12312 SEPTEMBER TERM, 1958 SEPTEMBER SESSION, 1958

GEORGE SOLLITT CONSTRUCTION COMPANY, a corporation,
Plaintiff-Appellee,
v.
GATEWAY ERECTORS, INCORPORATED, a corporation,
Defendant-Appellant,
and THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, a corporation,
Defendant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

October 22, 1958

Before DUFFY, *Chief Judge*, and SCHNACKENBERG and HASTINGS, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Gateway Erectors, Incorporated, a corporation,[1] has appealed from a judgment of the district court in favor of plaintiff, entered in an action at law in which the cause was submitted to the court on the pleadings and a stipulation of facts. Plaintiff's action was brought to recover damages for an alleged breach of an indemnity clause appearing in each of two written agreements between it and Gateway. The judgment was for $112,239.08 and costs. The judgment also dismissed Gateway's insurer. The Fidelity and Casualty

[1] Herein referred to as Gateway.

Company of New York, a corporation,[2] as a defendant, without prejudice, evidently because the action against it was premature, and the propriety of that dismissal is not challenged.

We now set forth a statement of the established relevant facts.

The University of Chicago contracted with the United States of America to design and construct a hospital in Chicago, and, under date of June 12, 1950, the University by contract awarded a portion of the work thereunder to plaintiff. The latter contract refers to plaintiff as the contractor, and provides:

"ARTICLE XII — LIABILITY FOR DAMAGE TO PERSONS AND PROPERTY

1. The Contractor assumes entire responsibility and liability for losses, expenses, damages, demands, and claims in connection with or arising out of any injury or alleged injury (including death), or damage or alleged damage to property, sustained or alleged to have been sustained in connection with or to have arisen out of the performance of the work by the Contractor, its subcontractors and their agents, servants, and employees, including losses, expenses, or damages sustained by the University or the Government, and shall indemnify and hold harmless the University (and the Board of Trustees of said University, individually and collectively), and the Government, the agents, servants, and employees of the foregoing from any and all such losses, expenses, damages, demands and claims, and shall defend any suit or action brought against them, or any of them, based on any such alleged injury or damage, and shall pay all damages, costs, and expenses, including attorney's fees, in connection therewith or resulting therefrom.

2. 'Injury' or 'damage', as those words are used in Section 1 of this Article, shall be construed to

[2] Herein referred to as Fidelity.

include, but not be limited to, injury or damage consequent upon the failure or use or misuse by Contractor, its agents, servants, and employees, of any hoist, rigging, blocking, scaffolding or any and all other kinds of equipment, whether or not owned, furnished by the University or the Government.

" • • • "

By two written contracts, dated June 22, 1950 and December 8, 1950, in which plaintiff was referred to as party of the first part and Gateway was referred to as party of the second part, Gateway was employed by plaintiff to do the steel reinforcing and certain allied work. Each of said contracts provided, in part, as follows:

"the party of the second part [Gateway] will fully relieve the party of the first part [plaintiff] of all responsibility for furnishing and completing all of the Erection of Reinforcing Steel and Reinforcing Steel Mesh under said first party's general contract with University of Chicago hereinafter designated Owner, for the erection of the above named building; and that the conditions of said contract between the party of the first part and said Owner dated June 12, 1950, are made a part of this agreement; further, that all rights and stipulations of the Architects and Owner on said work shall be as agreed upon in said General Contract.

• • •

Party of the Second Part [Gateway] Agrees as Follows:

• • •

Article 3. [A] That he will save the party of the first part, the Owner, and the Architect free and harmless against any expense, loss, cost or damage arising from or on account of:

1. Injuries to party of the second part and his employees.

2. Injuries to the public.

3. Damage to property caused by party of the second part, his employees, agents, and subcontractors.

4. Any negligence or carelessness of party of second part, his agents, employees, and subcontractors.

[B] That before entering upon the performance of this contract, the party of the second part will procure, at his own expense, insurance covering the above-mentioned liabilities from insurance companies, and in amounts and limits satisfactory to party of the first part, and that said insurance will be kept in full force and effect at all times while this contract shall remain in force and not fully performed on his part, such insurance coverage to be evidenced by certificates of insurance delivered to party of the first part.

[C] That if the party of the first part so elects, party of the second part will furnish a satisfactory indemnity accident policy protecting party of the first part and the Owner in case of accident to party of the second part, his agents, employees, subcontractors, or the public, and that if any suits are entered against party of the first part or the Owner on account of acts or omissions by party of the second part, his agents, employees or subcontractors, the party of the second part will defend such suits and reimburse either or both the party of the first part or the Owner for any expense, costs, loss or damage they may be put to, including court costs and attorneys' fees."[3]

A certificate of insurance issued by Fidelity shows that Gateway was the insured in a policy or policies issued by Fidelity, in effect from April 1, 1951 to April 1, 1952. To the certificate was attached a contractual agreement executed by Fidelity under date of June 22, 1950 as an endorsement to a public liability insurance policy issued by Fidelity to Gateway, which agreement reads in part as follows:

"B—Liability for Damage to Persons and Property.

1. The Sub-Contractor assumes entire responsibility and liability for losses, expenses, damages, de-

[3] The alphabetical designations of the three paragraphs of Article 3 were inserted by us for convenience of reference thereto.

mands, and claims in connection with or arising out of any injury or alleged injury (including death), or damage or alleged damage to property, sustained or alleged have been sustained in connection with or to have arisen out of the performance of the work by the Sub-Contractor, its Sub-Contractors and their agents, servants, and employees, including losses, expenses, or damages sustained by the Contractor, the University or the Government, and shall indemnify and hold harmless the Contractor, the University (and the Board of Trustees of said University, individually and collectively), and the government, the agents, servants, and employees of the foregoing from any and all such losses, expenses, damages, demands and claims, and shall defend any suit or action brought against them or any of them, based on any such alleged injury or damage, and shall pay all damages, costs, and expenses, including attorney's fees, in connection therewith or resulting therefrom.

2. 'Injury' or 'damage,' as those words are used in Section 1 of this Article, shall be construed to include, but not limited to, injury or damage consequent upon the failure or use or misuse by subcontractor, its agents, servants, and employees, of any hoist, rigging, blocking, scaffolding or any and all other kinds of equipment, whether or not owned, furnished by the Contractor, the University or the Government."[4]

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[4] The contractual agreement also provided: "This endorsement shall not be binding upon the company unless countersigned; nor shall anything contained herein be held to waive, alter, change or extend any of the conditions, limits, provisions, agreements, statements or declarations of **the policy** other than as above stated." (Boldface supplied for emphasis.) It is evident that, when the foregoing contractual agreement was executed by Fidelity under date of June 22, 1950, there was one of its policies outstanding insuring Gateway, similar to the policy in effect from April 1, 1951 to April 1, 1952. This inference is clear from several facts, including the fact that Gateway's first contract with plaintiff was dated June 22, 1950, ante 3.

It will be noted that the contractual agreement which Gateway procured from Fidelity, dated June 22, 1950, in paragraphs 1 and 2 thereof used precisely the language of the contract between the University and plaintiff, with the exception that Gateway is referred to as the subcontractor, while in the University contract with plaintiff, the latter is referred to as the contractor.

On January 22, 1952, Philip Shoevlin was employed by Gateway as a metal worker in connection with the construction work on the hospital which was then being erected, pursuant to said contracts. While he was removing certain equipment at the 7th floor from a hoist provided by plaintiff, it fell to the ground, injuring Shoevlin. The fall of said hoist was caused by a defective "dog" which served to engage a gear on the hoist drum, or some other negligence or breach of duty by plaintiff or its employees.

Shoevlin sued plaintiff in a state court to recover damages on account of his injuries. Immediately plaintiff's insurer, Liberty Mutual Insurance Company, demanded that Fidelity assume the defense of the suit, which Fidelity refused to do. The case was tried and a judgment for $140,000 was entered in favor of Shoevlin. Pending appeal, Gateway and Fidelity were notified that an agreement had been reached by plaintiff's attorneys to settle the judgment for $90,000 and demand was made that Gateway "take over this matter and indemnify" plaintiff.

Plaintiff paid $90,000 to Shoevlin and no question is here raised as to the propriety of such settlement. Plaintiff also paid $4,000 in attorneys' fees incurred in defense of the Shoevlin case and investigation costs of $590.80.

Plaintiff does not claim that the occurrence giving rise to Shoevlin's judgment was occasioned by the negligence of others than plaintiff or its employees. It is admitted that the injuries were sustained by Shoevlin while he was in the employ of Gateway when a hoist used by him in such employment fell on the premises of the hospital during his regular hours of employment at the construction work being performed by Gateway under its contracts with plaintiff.

There is no dispute among the parties that Illinois law governs the questions now presented to us.

In *Westinghouse Co.* v. *La Salle Monroe Bldg. Corp.*, 395 Ill. 429, 70 N.E. 2d 604, the court considered the language of a contract between contractor Westinghouse and the owner of a building in which the contractor agreed to reconstruct certain elevators. An employee of the contractor was fatally injured by the falling of one of the elevators being worked upon, due to negligence of an employee of the owner, which contended that, under its contract, the contractor agreed to indemnify it against damages arising from the employee's injury and death. The contract provided:

> "The contractor agrees to provide and pay compensation for injuries sustained by any of his employees arising out of or in the course of employment on the within mentioned building, in accordance with the requirements of the State Laws, and further agrees to carry insurance in a company satisfactory to the owner fully protecting himself, the Architects and Engineers, the Consulting Engineer, and the Owner against claims which may be made under said laws and agrees to deposit said policy or a true copy thereof (or a certificate from the Insurance Company issuing said policy, showing insurance in force) with the Architects and Engineers. . . .
>
> "The contractor further agrees to indemnify and hold the owner, the owner's employees and agents, the Architects and Engineers, and the City of Chicago, wholly harmless from any damages, claims, demands or suit by any person or persons arising out of any acts or omissions by the Contractor, his agents, servants or employees in the course of any work done in connection with any of the matters set out in these specifications, and the contractor shall carry at his own expense insurance in a company satisfactory to the owner to cover the aforesaid liabilities."

The contractor paid workman's compensation on account of the accident and sued the owner to recover the amounts

so paid on the ground that the injury was occasioned through the negligence of the owner. The court said, at 433, referring to the owner as appellant:

> "* * * The contract contains no words specifically providing that appellee was to indemnify appellant against the negligence of appellant's employees. Appellant contends that the language of the first clause quoted herein is broad enough to include indemnity against claims arising as this one. The argument is that the agreement of the contractor to 'carry insurance in a company satisfactory to the owner fully protecting himself, the Architects and Engineers, the Consulting Engineer, and the Owner against claims which may be made under said laws,' is broad enough to cover this case.
>
> "It is quite generally held that an indemnity contract will not be construed as indemnifying one against his own negligence, unless such a construction is required by clear and explicit language of the contract, * * * or such intention is expressed in unequivocal terms. * * * "

The court cited *Perry* v. *Payne*, 217 Pa. 252, 66 Atl. 553, which held that a contract of indemnity against personal injuries should not be construed to indemnify against the negligence of the indemnitees, unless it is so expressed in unequivocal terms. It pointed out that liability on such an indemnity is so hazardous, and the character of the indemnity so unusual and extraordinary, that there can be no presumption that the indemnitor intended to assume the responsibility, unless the contract puts it *beyond doubt by express stipulation.*

Does the language of Article 3 of the contracts between plaintiff and Gateway, *beyond doubt by express stipulation* show that Gateway intended to assume such responsibility? Obviously there is no such express stipulation. Is a construction of Article 3 as an indemnification of plaintiff against its own negligence required by clear and explicit language in said article, or is such intention expressed in unequivocal terms?

A reading of paragraph A thereof not only fails to show even an approach to these requirements, but reveals confusion in regard to what the paragraph actually does mean. It purports to list the events covered by the indemnity in four items. The first two items mention injuries (which we shall assume means personal injuries) and the third item mentions damage to property. None of these items refers to the act *causing* the injuries or the damage.

The fourth item does not mention either injuries to persons or damage to property but is limited to "any negligence or carelessness of Gateway, his agents, employees and subcontractors". Negligence, unless it causes an injury or damage, is not actionable. Obviously if we attempt to consider the fourth item separately from the preceding three items, we are frustrated, because neither negligence nor carelessness without an injury to another or damage to another's property can result in expense, loss, cost or damage to plaintiff, or anyone else. It therefore seems necessary to combine the fourth item with some one of the first three items in order to give sense to paragraph A. That this must be done is also indicated by the fact that, even if we were to attempt by implication to add to the language of items 1 and 2 and thereby to include actionable negligence of Gateway, we would to that extent be rewriting the indemnity undertaking. Certainly we would not then be meeting the exacting requirements of the *Westinghouse* case which does not countenance our rewriting the contract in order to make it clear and explicit, or in order to supply unequivocal terms. In fact, the absence of express stipulation in the language used is only emphasized by any attempt to amplify it.

If the draftsman of paragraph A intended that plaintiff should be indemnified by Gateway against losses arising from injuries to employees of Gateway and injuries to the public, caused by the negligence of plaintiff or its employees, the Illinois law required that an express reference to the negligence of plaintiff should have been incorporated. Such language is not in paragraph A and Illinois law does not permit us to engraft it thereon.

While item 2, reading "injury to the public" is not directly involved in this case, the curious isolation of those words has some significance in our problem of construction. Some of the questions arising are: 1. Injuries caused by whom? 2. Are said injuries sufficient to saddle Gateway with a duty to indemnify plaintiff, if caused by another subcontractor's employees? 3. Must negligence of Gateway be the cause of said injuries? and so on *ad infinitum*.[5]

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[5] The following thoughts are in no way used as a basis for the foregoing opinion.

While it is not necessary that we should solve the mystery surrounding the arrangement and punctuation in paragraph A, we are tempted to suggest that a restatement of paragraph A in one continuous sentence, eliminating the indentations and item numbers (which we believe are artificial), shows that in some prior draft in **did** consist of a single sentence, which may even now be reconstructed in the following form:

> "That he will save the party of the first part, the Owner, and the Architect free and harmless against any expense, loss, cost or damage arising from or on account of injuries to party of the second part and his employees injuries to the public, [and] damage to property, caused by party of the second part, his employees, agents, and subcontractors [by] any negligence or carelessness of party of second part, his agents, employees, and subcontractors."

This reconstructed sentence indicates that the essential purpose of paragraph A is to limit the liability of Gateway as an indemnitor to the results of the negligence of itself, its agents, employees and subcontractors. There is no negligence charged against Gateway. It is stipulated that the only negligence causing the death of Shoevlin was that of plaintiff.

While punctuation, used wisely, is an effective aid in conveying the meaning of language, **Grengs v. Twentieth Century Fox**, 232 F.2d, 325, 328, an inept use of paragraphing, commas and periods, can obscure the meaning of otherwise clear language.

Contending that Gateway's obligation to save plaintiff harmless for injuries to Gateway's employees is "absolute", "unqualified", "clear", "unequivocal" and "unlimited", plaintiff looks to the entire language of Article 3, but in justifying that contention it sloughs off item 4 as a "catchall", because it imposes "an obligation which would be imposed by law in any event". It stands squarely on item 1 as applicable to this case and refuses to recognize that the language of item 1 must be read with item 4, which in our opinion is not a superfluous catchall inserted to impose an obligation which, in the words of plaintiff's counsel, "would be imposed by law in any event". Plaintiff's method of reasoning is not a reliance upon either clear and explicit language or an expression of intention in unequivocal terms, as required by Illinois law.

We hold that Gateway did not indemnify plaintiff against damages resulting from Shoevlin's accident.

The views herein expressed are consistent with the state law as set forth in *Russell* v. *Shell Oil Co.*, 339 Ill. App. 168, 170, 172, 89 N.E. 2d 415; *Northern States Co. Inc.* v. *A. Finkl & Sons Co.*, 8 Ill. App. 2d 419, 422, 132 N.E. 2d 59; *Insurance Co. of North America* v. *E. J. & E. R. R. Co. and U. S. Steel Company*, 7 Cir., 229 F.2d 705, 707, 712; *Indemnity Insurance Co. of North America* v. *Koontz-Wagner Electric Co.*, 7 Cir., 233 F.2d 380, 382; and *United States* v. *Starks, et al.*, 7 Cir., 239 F.2d 544, 545, 547, which plaintiff cites.

For these reasons, the judgment of the district court is reversed.

REVERSED.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit.

138 IN THE UNITED STATES DISTRICT COURT.

* * (Caption 54-C-34) * *

MEMORANDUM AND ORDER.

This matter came on to be decided by the Court without a jury on the pleadings, stipulation of facts in open Court, here adopted as the Court's findings of facts, and argument of counsel on written briefs.

Plaintiff initially sought declaratory judgment with respect to plaintiff's right to indemnity in connection with then pending litigation; and in its later supplementary amended complaint, after termination of that litigation, sought to recover such indemnity from defendant Gateway Erectors, Incorporated, and the latter's insurer.

It is the contention of defendants that the agreement contained in Article 3 of the contract between plaintiff and Gateway, exhibit A to the supplementary amended complaint, cannot be construed as an agreement to indemnify plaintiff against plaintiff's own negligence, and that the presumption against such an undertaking must prevail in this case.

It is undisputed that one may contract to indemnify against his own negligence. Such obligation of course must be expressed in clear, explicit and unequivocal terms. It is the considered conclusion of this Court that the terms of the agreement between plaintiff and Gateway are clear, explicit and unequivocal and do dictate entry of judgment in this action for plaintiff and against defendant Gateway.

139 It is hereby directed that judgment be entered accordingly.

The Court further concludes that, as this action is based on a written instrument and as defendant Gateway's liability became fixed on payment by plaintiff to Shoevlin May 11, 1954, plaintiff is entitled to recover interest at the legal rate.

Plaintiff is, accordingly, granted leave to amend its complaint to increase the ad damnum in order to cover interest as indicated from May 11, 1954.

It further appears to the Court that plaintiff's action against defendant The Fidelity and Casualty Company of New York, is premature, and that finding with respect thereto must be, and it is hereby so ordered, in favor of defendant The Fidelity and Casualty Company of New York.

Win G. Knoch,
United States District Judge.

Date: Feb. 3, 1958.

Docket No. 34723—Agenda 48—May, 1958.

Virginia O'Callaghan, Admr., Appellant, v. Waller & Beckwith Realty Company, Appellee.

Mr. Justice Schaefer delivered the opinion of the Court:

This is an action to recover for injuries allegedly caused by the defendant's negligence in maintaining and operating a large apartment building. Mrs. Elia O'Callaghan, a tenant in the building, was injured when she fell while crossing the paved courtyard on her way from the garage to her apartment. She instituted this action to recover for her injuries, alleging that they were caused by defective pavement in the courtyard. Before the case was tried, Mrs. O'Callaghan died and her administrator was substituted as plaintiff. The jury returned a verdict for the plaintiff in the sum of $14,000, and judgment was entered on the verdict. Defendant appealed. The Appellate Court held

that the action was barred by an exculpatory clause in the lease that Mrs. O'Callaghan had signed, and that a verdict should have been directed for the defendant. (15 Ill. App. 2d 349.) It therefore reversed the judgment and remanded the cause with directions to enter judgment for the defendant. We granted leave to appeal.

In reaching its conclusion the Appellate Court relied upon our recent decision in *Jackson* v. *First National Bank*, 415 Ill. 453. There we considered the validity of such an exculpatory clause in a lease of property for business purposes. We pointed out that contracts by which one seeks to relieve himself from the consequences of his own negligence are generally enforced "unless (1) it would be against the settled public policy of the State to do so, or (2) there is something in the social relationship of the parties militating against upholding the agreement." (415 Ill. at 460.) And we held that there was nothing in the public policy of the State or in the social relationship of the parties to forbid enforcement of the exculpatory clause there involved.

The exculpatory clause in the lease now before us clearly purports to relieve the lessor and its agents from any liability for personal injuries or property damage caused by any act or neglect of the lessor or its agents. It does not appear to be amenable to the strict construction to which such clauses are frequently subjected. (See 175 A.L.R. 8.89.) The plaintiff does not question its applicability, and she concedes that if it is valid it is effective to bar her recovery. She argues vigorously, however, that such a clause is contrary to public policy, and so invalid, in a lease of residential property.

Freedom of contract is basic to our law. But when that freedom expresses itself in a provision designed to absolve one of the parties from the consequences of his own negligence, there is danger that the standards of conduct which the law has developed for the protection of others may be diluted. These competing considerations have produced results that are not completely consistent. This court has refused to enforce contracts exculpating or limiting lia-

bility for negligence between common carriers and shippers, of freight or paying passengers; (*Chicago and Northwestern Railway Co.* v. *Chapman*, 133 Ill. 96,) between telegraph companies and those sending messages, (*Tyler, Ullman & Co.* v. *Western Union Telegraph Co.*, 60 Ill. 421,) and between masters and servants, (*Campbell* v. *Chicago, Rock Island and Pacific Railway Co.*, 243 Ill. 620.) The obvious public interest in these relationships, coupled with the dominant position of those seeking exculpation, were compelling considerations in these decisions, which are in accord with similar results in other jurisdictions. See 175 A.L.R. 8.

On the other hand, as pointed out in the *Jackson* case, the relation of lessor and lessee has been considered a matter of private concern. Clauses that exculpate the landlord from the consequences of his negligence have been sustained in residential as well as commercial leases. (*Manaster* v. *Gopin*, 330 Mass. 569 (1953), 116 N.E. 2d 134; *Mackenzie* v. *Ryan*, 230 Minn. 378 (1950), 41 N.W. 2d 878; *Kirshenbaum* v. *General Outdoor Adv. Co.*, 258 N.Y. 489 (1932), 180 N.E. 245; *King* v. *Smith*, 47 Ga. App. 360 (1933), 170 S.E. 546; *Wright* v. *Sterling Land Co.*, 157 Pa. Super. 625 (1945), 43 A. 2d 614; 6 Williston on Contracts, sec. 1715D; 6 Corbin on Contracts, sec. 1472.) There are intimations in other jurisdictions that run counter to the current authority. (See *Kuzmiak* v. *Brookchester, Inc.*, 33 N.J. Super. 575 (1955), 111 A. 2d 425; *Kay* v. *Cain* (App. D.C. 1946), 154 F. 2d 305.) The New Hampshire court applies to exculpatory clauses in all leases its uniform rule that any attempt to contract against liability for negligence is contrary to public policy. (*Papkalos* v. *Shaka*, 91 N.H. 265 (1941), 18 A. 2d 377.) But apart from the *Papkalos* case we know of no court of last resort that has held such clauses invalid in the absence of a statute so requiring.

An anticipatory agreement relieving a party from liability for the consequences of his own negligence, whether in the form of a release, a covenant not to sue or an indemnity agreement, requires no violation of duties imposed

by the constitution, statute, or common law. A contract shifting the risk of liability for negligence may benefit a tenant as well as a landlord. (See *Cerny-Pickas & Co.* v. *C. R. Jahn Co.*, 7 Ill. 2d 393.) Such an agreement transfers the risk of a possible financial burden, and so may minimize the sanctions that induce adherence to the required standard of care. But the legal duty remains unchanged. For this reason contracts for liability insurance as indemnity against one's own negligence are accepted, and even encouraged. E.g., see provisions of Financial Responsibility Act, Ill. Rev. Stat. 1957, chap. 95½, pars. 7—202(1) and 7—315.

The plaintiff contends that due to a shortage of housing there is a disparity of bargaining power between lessors of residential property and their lessees that gives landlords an unconscionable advantage over tenants. And upon this ground it is said that exculpatory clauses in residential leases must be held to be contrary to public policy. No attempt was made upon the trial to show that Mrs. O'Callaghan was at all concerned about the exculpatory clause, that she tried to negotiate with the defendant about its modification or elimination, or that she made any effort to rent an apartment elsewhere. To establish the existence of a widespread housing shortage the plaintiff points to numerous statutes designed to alleviate the shortage, (see Ill. Rev. Stat. 1957, chap. 67½, *passim*) and to the existence of rent control during the period of the lease. 65 Stat. 145 (1947), 50 append. U.S.C., sec. 1894.

Unquestionably there has been a housing shortage, and unquestionably that shortage has produced an active and varied legislative response. Since legislative attention has been so sharply focused upon housing problems in recent years, it might be assumed that the legislature has taken all of the remedial action that it thought necessary or desirable. One of the major legislative responses was the adoption of rent controls which placed ceilings upon the amount of rent that landlords could charge. But the very existence of that control made it impossible for a lessor to negotiate for an increased rental in exchange for the elimination of an

exculpatory clause. We are asked to assume, however, that the legislative response to the housing shortage has been inadequate and incomplete, and to augment it judicially.

The relationship of landlord and tenant does not have the monopolistic characteristics that have characterized some other relations with respect to which exculpatory clauses have been held invalid. There are literally thousands of landlords who are in competition with one another. The rental market affords a variety of competing types of housing accommodations, from simple farm house to luxurious apartment. The use of a form contract does not of itself establish disparity of bargaining power. That there is a shortage of housing at one particular time or place does not indicate that such shortages have always and everywhere existed, or that there will be shortages in the future. Judicial determinations of public policy should, we think, rest upon a durable moral basis. Other jurisdictions have dealt with this problem by legislation. (McKinney's Consol. Laws of N.Y. Ann., Real Property Laws, sec. 234, Vol. 49, Part I; Ann. Laws of Mass., Vol. 6, c. 186, sec. 15.) In our opinion the subject is one that is appropriate for legislative rather than judicial action.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

MR. JUSTICE BRISTOW, dissenting.